

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

Filed: June 20, 2023

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Estate of KENNETH ARMSTRONG \*

*Decedent, by and through, ALICEA* \*

ARMSTRONG, *as Personal* \*

*Representative,* \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

\* \* \* \* \*

UNPUBLISHED

No.18-0356V

Special Master Horner

Attorneys' Fees and Costs

*Isaiah Kalinowski*, Bosson Legal Group, Fairfax, VA, for Petitioner.

*Mary E. Holmes*, United States Department of Justice, Washington, DC, for Respondent.

### **DECISION ON ATTORNEYS' FEES AND COSTS<sup>1</sup>**

On March 7, 2018, Alicea Armstrong (“petitioner”), as the personal representative of the Estate of Kenneth Armstrong (“Mr. Armstrong”), filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*,<sup>2</sup> (the “Vaccine Act”). Petitioner alleges that Mr. Armstrong suffered acute disseminate encephalomyelitis (“ADEM”). Petition at 5; Stipulation, filed August 1, 2022, at ¶ 4. Mr. Armstrong passed away on July 17, 2017; and petitioner further alleges that his death was the sequela of his alleged vaccine-related injury. Petition at 9, Stipulation at ¶ 4. On August 1, 2022, the parties filed their stipulation, which I adopted as my decision awarding compensation on the same day. (ECF Nos. 81, 82).

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<sup>1</sup> I intend to post this Ruling on the United States Court of Federal Claims’ website. **This means the Ruling will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access. Because this unpublished ruling contains a reasoned explanation for the action in this case, I am required to post it on the United States Court of Federal Claims’ website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

<sup>2</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2012) (“Vaccine Act” or “the Act”). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. §§ 300aa.

On August 15, 2022, petitioner filed a motion for attorneys' fees and costs. (ECF No. 85) ("Fees Mtn."). Petitioner requests total attorneys' fees and costs in the amount of \$119,197.01, representing \$112,357.81 in attorneys' fees and \$6,839.20 in costs. Fees Mtn. at 1-2. Pursuant to General Order No. 9, petitioner has indicated that she has personally incurred costs in pursuit of this litigation in the amount of \$30.16. Fees Mtn. Ex. 4 at 1. Respondent filed a response on August 16, 2022, indicating that he "is satisfied the statutory requirements for an award of attorneys' fees and costs are met in this case." Response at 2 (ECF No. 86). That same day, petitioner filed her reply stating the fees and costs incurred are reasonable and should be awarded as requested. (ECF No. 87).

This matter is now ripe for consideration.

## **I. Reasonable Attorneys' Fees and Costs**

The Vaccine Act permits an award of reasonable attorneys' fees and costs. § 15(e). The Federal Circuit has approved the lodestar approach to determine reasonable attorneys' fees and costs under the Vaccine Act. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). This is a two-step process. *Id.* at 1347-48. First, a court determines an "initial estimate . . . by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Second, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. *Id.* at 1348.

It is "well within the special master's discretion" to determine the reasonableness of fees. *Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521-22 (Fed. Cir. 1993); *see also Hines v. Sec'y of Health & Human Servs.*, 22 Cl. Ct. 750, 753 (1991). ("[T]he reviewing court must grant the special master wide latitude in determining the reasonableness of both attorneys' fees and costs."). Applications for attorneys' fees must include contemporaneous and specific billing records that indicate the work performed and the number of hours spent on said work. *See Savin v. Sec'y of Health & Human Servs.*, 85 Fed. Cl. 313, 316-18 (2008). Such applications, however, should not include hours that are "excessive, redundant, or otherwise unnecessary." *Saxton*, 3 F.3d at 1521 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

Reasonable hourly rates are determined by looking at the "prevailing market rate" in the relevant community. *See Blum*, 465 U.S. at 894-95. The "prevailing market rate" is akin to the rate "in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 895, n.11. Petitioners bear the burden of providing adequate evidence to prove that the requested hourly rate is reasonable. *Id.*

Special masters can reduce a fee request *sua sponte*, without providing petitioners notice and opportunity to respond. *See Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (Fed. Cl. 2009). When determining the relevant fee reduction, special masters need not engage in a line-by-line analysis of petitioners' fee application. *Broekelschen v. Sec'y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (Fed. Cl. 2011). Instead, they may rely on their experience with the Vaccine Program to determine the reasonable number of hours expended. *Wasson v. Sec'y of Dep't*

*of Health & Human Servs.*, 24 Cl. Ct. 482, 484 (1991), *rev'd on other grounds and aff'd in relevant part*, 988 F.2d 131 (Fed. Cir. 1993). Just as “[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications.” *Saxton*, 3 F.3d at 1521.

#### **a. Hourly Rates**

Petitioner requests the following hourly rates for the work of her counsel: For Mr. Isaiah Kalinowski, \$358 per hour for work performed in 2017, \$369 per hour for work performed in 2018, \$383 per hour for work performed in 2019, \$400 per hour for work performed in 2020 and \$430 per hour for work performed in 2022. Fees. Mtn. at Ex 1 at 24. Mr. Kalinowski relocated from mctlaw to Bosson Law Group in 2022 and requested the same rate of \$430 per hour for time billed in 2022. The requested rates for all years have been previously awarded and the undersigned finds these rates to be reasonable and shall award them herein.

#### **b. Hours Expended**

Attorneys’ fees are awarded for the “number of hours reasonably expended on the litigation.” *Avera*, 515 F.3d at 1348. Counsel should not include in their fee requests hours that are “excessive, redundant, or otherwise unnecessary.” *Saxton*, 3 F.3d at 1521. While attorneys may be compensated for non-attorney-level work, the rate must be comparable to what would be paid for a paralegal or secretary. *See O’Neill v. Sec’y of Health & Human Servs.*, No. 08–243V, 2015 WL 2399211, at \*9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. *See, e.g., McCulloch*, 2015 WL 5634323, at \*26.

Upon review, the overall number of hours billed appears to be reasonable. I have reviewed the billing entries and find that they adequately describe the work done on the case and the amount of time spent on that work. I do not find any of the entries to be objectionable, nor has respondent identified any as such. Petitioner is therefore awarded final attorneys’ fees of \$112,807.80.

#### **c. Attorneys’ Costs**

Like attorneys’ fees, a request for reimbursement of attorneys’ costs must be reasonable. *Perreira v. Sec’y of Health & Human Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioner requests a total of \$44,906.25 in attorneys’ costs. This amount is comprised of acquisition of medical records, the Court’s filing fee, postage, and work performed by petitioner’s medical expert, Dr. Zurab Nadareishvili, M.D., PhD. Fees. Mtn. Ex 2 at 1 - 2. These costs have been supported with the necessary documentation and are reasonable. Petitioner is therefore awarded the full amount of costs sought.

## **II. Conclusion**

In accordance with the Vaccine Act, 42 U.S.C. § 300aa-15(e) (2012), I have reviewed the billing records and costs in this case and finds that petitioner’s request for fees and costs is reasonable.

Accordingly, petitioner is awarded the total amount of \$119,227.17<sup>3</sup> as follows:

- A lump sum of \$6,839.20, representing reimbursement for attorneys' fees and costs, in the form of a check payable jointly to petitioner and petitioner's counsel, Bosson Legal Group;
- A lump sum of \$112,357.81, representing reimbursement for attorneys' fees and costs, in the form of a check payable jointly to petitioner and petitioner's former counsel, mctlaw, and;
- A lump sum of \$30.16, representing reimbursement for petitioner's costs, in the form of a check payable to petitioner.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the Clerk of the Court shall enter judgment in accordance herewith.<sup>4</sup>

**IT IS SO ORDERED.**

s/Daniel T. Horner  
Daniel T. Horner  
Special Master

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<sup>3</sup> This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, § 15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally Beck v. Sec'y of Health & Human Servs.*, 924 F.2d 1029 (Fed. Cir.1991).

<sup>4</sup> Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. Vaccine Rule 11(a).